tion value instead of 33 1/3 per cent. as the master and the court assumed. The appellees insisted, on the other hand, that an item of $142,281 for grade raising included by master and court in the historical cost should be eliminated. We cannot say that there was error in overruling these contentions.

Second. Concerning deductions to be made from gross revenue in order to determine net earnings, the court differed from the master in regard both to the yearly charge for maintenance and to the depreciation annuity. It appeared that in the fifteen years since appellant acquired the system in 1905, the average annual expenditure for maintenance had been $42,771; that during the war the property had been admittedly undermaintained; that the expenditure was $64,108 in the calendar year 1919; $80,322 in the fiscal year ending June 30, 1920, and $90,861.28 in the calendar year 1920. The court estimated the proper charge for current maintenance at $70,000, and allowed, in addition, a depreciation annuity of $45,245 (that is, 4 per cent. on property subject to depreciation) to provide a fund out of which annual replacements and renewals could be made. Thus the court allowed for the year's depreciation and maintenance $115,245, which is nearly 14 per cent. of the historical reproduction value, and about 10 per cent. of the assumed reproduction cost, of the depreciable part of the system. The master allowed $147,146.40 for maintenance and depreciation during the year ending June 30, 1920. This larger figure was arrived at, partly by charging as cost of maintenance the full $80,322 expended during that year, and partly by including as depreciable property expenditures for overhead items which the court excluded. The proper annual charge for maintenance is the amount normally required for that purpose during the period; it is not necessarily the amount actually expended within the year. Many items included in the overhead cost of original construc-

tion may properly be excluded in calculating the amount of the depreciation annuity. We cannot say that the court erred in limiting the year's maintenance and depreciation allowances to an aggregate of $115,245.

The company asked to have allowed as a further charge $29,500 a year on account of what it called deferred maintenance. The contention is that, during the war and two years following, the company had deferred maintenance, pursuant to a policy established at the express request of the Government to the end that material and labor might be released for war purposes; that to make good this deferred maintenance would cost $197,000; and that in order to amortize this amount an annual allowance from earnings of $29,500 should be made for five years. This is an attempt, in another form, to capitalize alleged past losses; and the request was properly refused both by the master and the court.

Third. The remaining item as to which the master and the court differed relates to the income tax. The company assigns as error that the master allowed, but the court disallowed, as a part of the operating expenses for the year ending June 30, 1920, the sum of $16,254 paid by the company during that year for federal income taxes. The tax referred to is presumably that imposed by the Act of February 24, 1919, c. 18, §§ 230–238, 40 Stat. 1057, 1075–1080, which for any year after 1918 is 10 per cent. of the net income. In calculating whether the five-cent fare will yield a proper return, it is necessary to deduct from gross revenue the expenses and charges; and all taxes which would be payable if a fair return were earned are appropriate deductions. There is no difference in this respect between state and federal taxes or between income taxes and others. But the fact that it is the federal corporate income tax for which deduction is made, must be taken into consideration in determining what rate of return shall be deemed fair. For under § 216 the stock-

holder does not include in the income on which the normal federal tax is payable dividends received from the corporation. This tax exemption is therefore, in effect, part of the return on the investment.[1]

It is thus clear that both in the year ending June 30, 1920, and in the calendar year 1920, the net earnings of the system were less than 8 per cent. of its value, whether the value be estimated on the basis of prudent investment or on the basis of the reproduction cost actually adopted. When the court rendered its decision the ordinance had been tested for more than a year and a half—a period ample in ordinary times to test the current effect of the rate prescribed and to indicate its probable effect in the near future. The times here involved were, however, in a high degree abnormal. It did not follow that, because the system had earned less than 8 per cent. in 1919 and in 1920, it would earn less than 8 per cent. in 1921. A rate ordinance invalid when adopted may later become valid, just as an ordinance valid when made may become invalid by change in conditions. *Municipal Gas Co.* v.

[1] It is difficult to see how, on the facts presented, so large a sum as $16,254 could have been paid on account of the year's operation. Indeed the court, in disallowing the item of federal income tax, deducted not $16,254, but $8,008. Even this seems too large, for the net earnings, without deduction of the $16,254 attributed to income tax, for the year ending June 30, 1920, as found by the master, were $66,503.60. From this, interest paid or accrued on indebtedness is to be deducted before computing the net income on which the tax is payable. A large part of the capital of utility companies is ordinarily represented by interest-bearing bonds and notes; and there is evidence that such indebtedness of the appellant was "in the neighborhood of $1,400,000." The interest on this debt chargeable to the railway system would be at least $50,000. There is further an exemption from tax of $2,000 of the net income. So a 10 per cent. tax on the balance would amount to less than $1,500.

In the record and briefs elsewhere the income tax is reckoned at between $8,000 and $10,000, which is a proper figure if there be an 8 per cent. return on $1,626,061.

Public Service Commission, 225 N. Y. 89, 96. Compare *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19; *Newton* v. *Consolidated Gas Co., ante*, 165.

The District Judge was obliged to form an opinion as to the probable net earnings in the future. All relevant facts, except as stated, and all applicable arguments were fully and clearly presented by the parties and were carefully considered by the court. Although the District Judge treated the master's report as advisory merely, he passed upon the numerous exceptions taken to the master's findings in order to indicate his view on the precise points raised. He allowed some exceptions and disallowed others. Upon petition for rehearing further careful consideration was given to the case. Views expressed in the first opinion on some matters were modified; but these changes did not call for any change in the decree. The District Judge had before him some evidence not before the master; for the company's expert was recalled and testified both to the result of operations of later months in which there was a large increase in travel and to the heavy decline in prices which occurred after October. Concerning actual facts there was substantially no controversy. On the elements to be considered in determining whether the rate would be confiscatory no error was made which could substantially affect the result. His determination whether the prescribed rate would be confiscatory was necessarily based largely on a prophecy, for normal conditions had not been restored. He found that gross revenues were steadily increasing; and that they were larger under the five-cent fare than they had been during the preceding year when the six-cent rate was in effect. He was convinced that operating costs would decrease largely during the year. His two opinions show that every element upon which his prophecy should be based received careful consideration. We cannot say that the evidence compelled a conviction that the rate would

prove inadequate. Compare *San Diego Land & Town Co.* v. *National City*, 174 U. S. 739, 754. *San Diego Land & Town Co.* v. *Jasper*, 189 U. S. 439; *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1, 17.

The occasion for the suit was solely the extraordinary rise in prices incident to the war. There was no suggestion that the action of the Board evidenced hostility to the utility, or that the Board was arbitrary or hasty. It had been theretofore considerate of the company's rights and needs. When prices rose rapidly in 1918, it raised the fare limit to six cents, although the franchise ordinance prescribed the five-cent fare. And this was before our decision in *San Antonio* v. *San Antonio Public Service Co.*, 255 U. S. 547. Its reduction of the fare by ordinance of June 5, 1919, was made after hearing, and was doubtless due to the conviction, shared by many, that, with the cessation of hostilities and the negotiation of the Peace Treaty, prices and operating cost would fall abruptly. This prophecy, if such there was, proved false. But nearly three years have elapsed since the Board adopted the ordinance; and more than a year since entry of the decree below. We know judicially that the period has, in general, been one of continuous price recession, and that the current rates of return on capital are much lower than they then were.[1] But we cannot know to what extent the important changes occurring have affected either gross revenues or the net return. There is no reason to believe that the Board would not give full and fair consideration to a proposed change in rate if application were now made to it. And the District Judge stated in his opinion (272 Fed. 147), that the decree to be entered would be vacated or amended in case it should later appear that the regulating board declined such adjustment of rates as the ac-

[1] See Federal Reserve Bulletin, January, 1922, pp. 5, 79, 113; February, 1922, pp. 156–7.

tual experience of the utility might show it entitled to; and the decree was thereupon entered without prejudice.

The District Judge refused a temporary injunction and did not exact a bond. Hence the only relief we can grant is such as operates *in futuro*. Compare *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 464. An injunction should not issue now, unless conditions are such that the prescribed rate is confiscatory. As by the reservation in the decree appellant may secure protection against the ordinance if under existing conditions the five-cent rate appears to be inadequate, the decree should be affirmed. Compare *Lincoln Gas & Electric Light Co.* v. *Lincoln*, 250 U. S. 256, 268; *Ex parte Lincoln Gas & Electric Light Co.*, 256 U. S. 512; 257 U. S. 6.

Decree affirmed.